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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JUDITH DIAZ, Plaintiff and Appellant, v. LOS ANGELES COUNTY CIVIL SERVICE COMMISSION, Defendant and Respondent; COUNTY OF LOS ANGELES, Real Party in Interest and Respondent.	B282451 (Los Angeles County Super. Ct. No. BS155123)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Rains Lucia Stern St. Phalle & Silver and Gidian R. Mellk for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Hausman & Sosa, Jeffrey M. Hausman and Larry D. Stratton for Real Party in Interest and Respondent.

Judith Diaz[1] appeals from the trial court's denial of her petition for a writ of mandate challenging her dismissal as a deputy sheriff for real party in interest and respondent Los Angeles County (County) Sheriff's Department (Department). The County Civil Service Commission (Commission) upheld Diaz's dismissal based upon findings by a hearing officer after an eight-day administrative hearing. The dismissal was based on an incident in the early morning of October 14, 2011, during which Diaz fired several shots from her personal firearm at a fellow deputy sheriff while intoxicated following a fight.

Diaz claims that (1) the trial court erred in declining to suppress a statement that Diaz gave after the incident to investigators with the Department's Internal Criminal Investigations Bureau (ICIB), which Diaz argues was involuntary; (2) the trial court's ruling denying her petition is not supported by the evidence; and (3) the Department abused its discretion in deciding to impose the penalty of dismissal. We reject each of these claims. The record supports the trial court's

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[1] The record also refers to appellant as Judith Gonzalez. The parties use the name Diaz, and we therefore do as well.

ruling that Diaz engaged in an unjustified use of deadly force in circumstances reflecting a "profound lack of judgment."

BACKGROUND

1. The Incident

Diaz worked as a deputy sheriff with the Department from 2004 until she was discharged on May 1, 2013. Until the incident at issue, she had never been disciplined.

On October 13, 2011, Diaz went out for drinks with a friend and fellow deputy, Stephanie Hile. The two were joined by another deputy, Adrienne Myers. Myers was a friend of Hile, but Diaz knew her only slightly.

The three had drinks at two different locations until closing time. All three left in Hile's car. According to Diaz, Myers was driving.[2] Myers said that Hile was driving; Hile could not recall who drove. At some point near 3:00 a.m., they stopped the car at a parking lot at the La Mirada Gymnasium. A fight broke out, leading to the shots fired by Diaz. The participants had different versions of events.

a. *Diaz*

Diaz testified that Myers was driving fast and erratically, and Diaz questioned what Myers was doing. Myers told her to shut up. Diaz tried to ask Hile where they were going and began to call a friend to pick her up. Myers stopped the car.

Diaz jumped out of the car and she and Myers had words. Myers then hit Diaz in the face. Diaz tried to grab Myers, and

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[2] In her statement to ICIB investigators on the day of the incident, Diaz initially said she could not remember who was driving. Later in the interview, after the investigators questioned why she could not recall, she said it was Myers.

Myers took her to the ground, where Myers continued to punch her while straddling her. Diaz hit her head on the pavement.

Diaz heard Hile telling Myers to stop. The next thing Diaz knew, she saw Hile and Myers rolling on the ground fighting.

Diaz went to the car to try to find her cell phone. She was weak and felt blood coming down her face. She sat in the driver's seat and looked for her phone but could not find it. She saw Myers straddling Hile the same way that Myers had straddled her.

Diaz remembered that she had her personal firearm locked in the glove compartment of the car. She found her keys and retrieved her gun.

Diaz was able to walk only a few steps from the car because she was dizzy. She sat and pointed the gun at Myers.

In her testimony at the hearing, Diaz said that she then told Myers several times to get off Hile. Myers jumped off Hile and came toward Diaz, saying, "No. You're not going to shoot." Diaz felt weak and tired and "couldn't really see because I was — had blood in my — dripping in my eyes." She thought Myers was going to kill her. Diaz shot twice, "one shot after the other." When she fired her weapon, she intended to shoot Myers.

In her statement to ICIB investigators on the day of the incident, Diaz said that she shot once as Myers came toward her. She initially thought that she had hit Myers, but then she saw Myers "run away." Diaz shot again while Myers was running away. When asked why she shot the second time, Diaz said that "Myers was still moving. I didn't know if she was going to come towards me or she was running totally away from us." Later in the interview, Diaz said that, after the first shot, Myers "jumped to the side" and Diaz "wasn't sure if she was running towards me

again." Myers made a turn "like a U" and when Diaz saw her again, she fired for the second time.

Myers ran away. Hile came over to Diaz and told her to put the gun down.

b. *Hile*

Hile did not remember an argument, or how the fight between Myers and Diaz started. She just remembered seeing Myers on top of Diaz. Hile managed to push Myers off Diaz. Hile and Myers rolled, and Myers ended up on top of Hile. Hile did not remember Myers striking her. Hile heard a "pop," which she later learned was a gunshot, and Myers ran away.

c. *Myers*[3]

In a statement to investigators in July 2012, Myers said that Hile was driving and stopped at the parking lot after Myers complained that she was driving too fast. Diaz started yelling and Myers told her to be quiet. Diaz took a swing at her "out of the blue," and as she did so she tripped and fell. Myers got on top of Diaz and put her hand on Diaz's mouth to keep her quiet.

Hile came up behind Myers and hit her. Hile bent over to say something, and Myers pulled her to the ground by her hair. Diaz hit Myers and Myers hit back.

Diaz got loose and ran to the car. Myers saw Diaz get the gun and Myers started to run as Diaz turned. Myers heard a shot fired and heard the bullet pass her ear as she ran away. She heard a second shot as she continued to run. She ran to a nearby fire station.

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[3] Myers did not testify at the administrative hearing.

2. The Investigation

A neighbor heard the shots and called the Department. Department units and firefighters and paramedics responded to the scene. While at the scene, several of the firefighters heard Diaz make statements to the effect of "I wish I would have shot that bitch" or "I hope I shot that bitch."

Approximately 5:46 a.m., one of the deputies performed a breath test on Diaz. The test showed that Diaz had a blood-alcohol level of .15 (which is nearly twice the legal limit for driving).

Diaz declined treatment at the scene and was transported in a Department vehicle to the hospital. She was diagnosed with a broken nose.

When she was discharged from the hospital at close to 11:00 a.m., Diaz was taken back to the Department's Norwalk station. Two ICIB investigators, Sergeant Hanson and Sergeant Tobin, asked to speak with her. Diaz declined, as she had already retained an attorney. The investigators informed Diaz that she was not being criminally detained, but she was ordered to remain on duty at the station.

The investigators later returned and told Diaz they needed to take pictures of her. After the pictures, the investigators told Diaz they were going to arrest her.

Diaz asked to speak to her captain. Her captain advised her that they would have to arrest her if she didn't talk, and giving a statement was the only way she could go home. Diaz therefore agreed to give a statement. After giving the statement, Diaz was booked and released. The district attorney subsequently declined to prosecute her.

3. The Discharge Decision

The Department sent a letter dated May 1, 2013, informing Diaz of the final decision to discharge her. The letter stated three grounds: (1) violation of regulations requiring obedience to laws, regulations and orders concerning the incident on October 14, 2011; (2) carrying an off-duty weapon that had not been registered with the Department and that Diaz had not been qualified to carry off-duty; and (3) disorderly conduct, based upon the fact that Diaz, while intoxicated, was "involved in a physical altercation with Subject Myers." The letter concluded that, by her actions, Diaz had "brought discredit and embarrassment upon yourself and the Department."

4. The Administrative Hearing

Diaz requested an evidentiary hearing, which occurred over eight days from February through June 2014. After hearing testimony from over a dozen witnesses, the hearing officer concluded that discharge was an appropriate penalty for Diaz's conduct. The hearing officer described the incident as a "drunken brawl." He concluded that Diaz "may have gotten hurt in the fight but this was not a deadly attack that would justify using deadly force as she did." He observed that "[i]n her state of intoxication and impaired vision, [Diaz] was lucky not to have killed either Myers or Hile or both." The hearing officer concluded that Diaz shot in fear and anger rather than self-defense, citing Diaz's statement that she "should have shot the bitch."

The Commission approved the hearing officer's findings on January 30, 2015.

5. Diaz's Petition for a Writ of Mandate

Diaz filed her petition for a writ of administrative mandamus on April 16, 2015. The trial court issued a 24-page

tentative decision prior to the hearing on February 21, 2017, which the court later adopted as its ruling.

The trial court concluded that "[t]here is no reasonable possibility" that Diaz was justified in using deadly force during the incident. The court concluded that Diaz had good reason to believe that another deputy sheriff, "however enraged, would not kill her or Hile or commit great bodily injury." The court also observed that the "situation was a 2 on 1," and that, when she fired, Diaz had already retreated to the car.

The trial court credited Hile's testimony that Diaz fired her first shot while Myers was still straddling Hile. The court also observed that "[t]he conclusion that [Diaz] was not actually motivated by fear is corroborated by her statement that she wished she had hit Myers."

DISCUSSION

1. The Trial Court Did Not Err in Denying Diaz's Motion to Suppress Her Statement to Investigators

The parties dispute whether exclusion of Diaz's statement to the ICIB is a proper remedy even if there was law enforcement misconduct involved in obtaining that statement. The County argues that "the exclusionary rule is seldom applied in administrative proceedings," and only when "the employing agency acts in an egregious manner." (*California Science Center v. State Personnel Bd.* (2013) 218 Cal.App.4th 1302, 1307; *Department of Transportation v. State Personnel Bd.* (2009) 178 Cal.App.4th 568, 577–578 (*Department of Transportation*) ["In administrative discipline proceedings, 'a balancing test must be applied . . . and consideration must be given to the social consequences of applying the exclusionary rules and to the effect thereof on the integrity of the judicial process' "], quoting *Emslie*

v. State Bar (1974) 11 Cal.3d 210, 229.) Diaz argues that exclusion is a legally appropriate remedy here because the alleged violations of her right to remain silent were committed by Department deputies who were well aware that her statements might be used against her in disciplinary proceedings. We need not decide the legal issue of whether the exclusionary rule should apply here because the trial court properly ruled that Diaz failed to prove her constitutional rights were violated.[4]

We review independently the trial court's decision denying Diaz's motion to suppress under *Miranda.* (*Miranda, supra,* 384 U.S. 436; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1092 (*Guerra*).) However, in doing so, " 'we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.' " (*Guerra*, at pp. 1092–1093, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 992.)[5]

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[4] For the same reason, we also need not decide whether a more stringent exclusionary rule would apply here to statements that are coerced and involuntary than to statements that were simply obtained after a failure to comply with the requirements of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). (See *In re Martinez* (1970) 1 Cal.3d 641, 650; *Department of Transportation, supra,* 178 Cal.App.4th at p. 578.)

[5] Diaz filed an initial motion to suppress on July 5, 2016, that the trial court denied on October 27, 2016. The court reaffirmed that ruling in its final order denying Diaz's petition. The record on appeal does not contain the pleadings or the trial court's ruling from the initial motion to suppress. Thus, the record does not show whether, and how, the trial court resolved

Similarly, we independently review the trial court's determinations "as to whether coercive police activity was present" and whether Diaz's statements to the ICIB were voluntary. (*Guerra, supra,* 37 Cal.4th at p. 1093.) However, we review the trial court's findings concerning the circumstances surrounding Diaz's statements, "including the characteristics of the accused and the details of the interrogation," for substantial evidence. (*Ibid.*)

The test for whether a statement was voluntary takes into consideration the totality of the surrounding circumstances, including the characteristics of the accused and the details of the interrogation. (*Guerra, supra,* 37 Cal.4th at p. 1093.) The test examines " ' "whether a defendant's will was overborne" by the circumstances surrounding the giving of a statement.' " (*Ibid.,* quoting *Dickerson v. United States* (2000) 530 U.S. 428, 434.)

a. Miranda *waiver*

Diaz initially declined to speak with the ICIB investigators and retained a lawyer. Once Diaz had asserted her right to

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factual disputes concerning Diaz's motion. In this circumstance, we presume that the trial court made all reasonable inferences in support of its ruling. " 'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, quoting 3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238–2239.) However, the presumption is not of great importance here, as the facts are essentially undisputed. Diaz's agreement to waive her rights was recorded as part of the ICIB interview, and the circumstances leading up to that waiver are established by Diaz's own testimony.

remain silent and was represented by counsel, any waiver following further questioning initiated by law enforcement officers was presumptively invalid. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484–485.) However, Diaz could provide a valid waiver of her rights after *she* initiated further conversation. (*People v. Thompson* (1990) 50 Cal.3d 134, 162–164.) That is what happened.

Diaz testified that, after she initially declined to speak with Tobin and Hanson, she was moved to an office and, approximately an hour later, the deputies told her they needed to take pictures of her. They gave her a change of clothes and returned her to the office. Sometime later the deputies returned and told Diaz that they were going to arrest her. She asked why, and the deputies said that "[n]obody is talking, so we're going to need to arrest you."

According to Diaz, it was then that she "asked to speak to my captain." She was allowed to do so. Her captain told her, "You need to talk to them if you don't want to get arrested. That's the only way you're going to be able to go home." Based upon that advice, Diaz "decided to talk to the detectives."

Prior to interviewing Diaz after this decision, Tobin confirmed that Diaz had voluntarily made the decision to talk. The recording of the interview contains the following colloquy: "Tobin: Okay. The last time we spoke I gave you an admonition and I told you that you didn't have to talk to us. And I asked you, do you want to talk to us about our investigation, and you told me no. Do you remember that? [¶] [Diaz]: Yes. [¶] Tobin: Okay. Now, I want to remind you that that admonition still holds. And I actually followed that up with I gave you my business card and told you if you changed your mind and you want to talk to me, just get ahold of me. Do you remember that? [¶] [Diaz]: Yes. [¶]

Tobin: Okay. And then I found out from the—that—from your captain, Romero, that you indicated that you might want to talk to us about what happened. [¶] [Diaz]: Yes. [¶] Tobin: Is that the case? [¶] [Diaz]: Yes."

Following this exchange, Tobin explained Diaz's rights once more. Diaz acknowledged that she understood her rights and agreed to provide a statement. She answered "yes" to the question whether her agreement was "freely and voluntary and—because you think it's in the best interest of you?"

Thus, the record is clear that Diaz initiated the second contact with the investigators that led to her statement. Under these circumstances, her waiver of her *Miranda* rights was valid so long as it was voluntary and not coerced. (See *Guerra, supra,* 37 Cal.4th at p. 1093; *Colorado v. Connelly* (1986) 479 U.S. 157, 169–170 ["There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context"].)

b. *Voluntariness*

The record also shows that Diaz's agreement to provide a statement was voluntary. She repeatedly said as much prior to the interview. Before taking her statement, Tobin explained that he would ask a number of questions to "make sure that you're talking to us and it's freely and voluntary and that there's not been any coercion, nothing's been offered or promised or anything like that." He then confirmed with Diaz that (1) no one promised her anything in exchange for her statement; (2) no one told her that she would receive leniency or some other favor; (3) no one threatened her or told her that she could "suffer a worse fate" if she did not provide a statement; and, specifically, (4) no one told her that if she talked to the investigators, "that might stop the booking process."

As mentioned, Diaz testified that she agreed to talk with the investigators because her captain had told her that otherwise she would be arrested. Under the circumstances, this was neither a coercive threat nor a manipulative promise of leniency. It was simply a description of the likely next step in the investigation. The investigators had told Diaz that they intended to arrest her because "[n]obody is talking." In fact, they had begun the booking process. Based upon what her captain told her, Diaz "decided to talk to the detectives." When interviewed, she agreed that she had not been given any promises, including any promise that she would not be booked if she gave a statement.

Diaz's agreement to talk to the detectives was not coerced, but was a rational decision to offer information about what happened in the hope that she would be permitted to go home. In fact, that is what happened. She was booked and immediately released.[6]

Investigating officers "are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime." (*People v. Ray* (1996) 13 Cal.4th 313, 340, quoting *People v. Hill* (1967) 66 Cal.2d 536, 550.) The line between outlining the

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[6] Diaz testified that she was released pursuant to Penal Code section 849, subdivision (b)(1), which provides that a peace officer may release a person from custody when the officer "is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested." Following a release on this ground, "the arrest shall not be deemed an arrest, but a detention only." (Pen. Code, § 849, subd. (c).)

benefits that might flow from giving a statement and "impliedly promising lenient treatment" "can be a fine one." (*People v. Holloway* (2004) 33 Cal.4th 96, 117 (*Holloway*), quoting *People v. Thompson, supra,* 50 Cal.3d at p. 169.) However, the line was not crossed here.

Even if the information that Diaz's captain provided to her is attributed to the deputies investigating the incident (an issue that we need not consider), it was not an implied promise, but rather advice about what was likely to occur: If Diaz did not talk, she would be arrested and would not be free to leave. The possibility that giving a statement might permit her to leave was merely a potential benefit that would flow from a decision to provide information about the incident. (See *Holloway, supra*, 33 Cal.4th at p. 116 [detective's suggestion that an explanation that a killing was accidental or followed a blackout might " 'make[] a lot of difference' " did not promise lenient treatment, but simply told the defendant "the benefit that might ' "flow[] naturally from a truthful and honest course of conduct" ' "], quoting *People v. Jimenez* (1978) 21 Cal.3d 595, 612; see also *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1251 [statement that the judge would consider the appellant's cooperation with the investigation was not a promise of leniency].)

The circumstances of Diaz's confinement to the station during the investigation also do not show that Diaz's will was overborne. She was ordered not to leave the station while the investigators completed their investigation, which they did about six hours after Diaz arrived. Although Diaz testified that she had not eaten since the prior day, there is no evidence that the investigators deprived her of food. Diaz had received a medical examination before arriving at the station and had been medically cleared to book. She was a deputy sheriff and had

ample personal experience with the investigatory and judicial process. Her confinement to the station while the investigation was completed was less onerous than being held in custody following an arrest. As the trial court reasonably concluded, Diaz "may have been tired and hungry, but this fact is not sufficient to support a conclusion that she was coerced into giving a statement."

The trial court therefore did not err in denying Diaz's motion to suppress her statement to the ICIB.

2. Substantial Evidence Supports the Trial Court's Denial of Diaz's Petition

In deciding a petition for a writ of administrative mandate where a local agency has made a decision affecting a vested property interest, a trial court " 'not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence.' " (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816, fn. 8.)[7] The exercise of independent judgment means that a trial court determines whether a local agency's findings are supported by the "weight of the evidence." (Code Civ. Proc., § 1094.5, subd. (c); *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32.)

On appeal, we examine the administrative record to determine if the trial court's decision is supported by substantial evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10;

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[7] Termination of public employment affects such a vested interest. (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 314.)

Alberda v. Board of Retirement of Fresno County Employees' Retirement Assn. (2013) 214 Cal.App.4th 426, 433–434.) In applying that standard, we " ' "resolve all conflicts and indulge all reasonable inferences in favor of the party who prevailed in the trial court." ' " (*Rodriguez v. City of Santa Cruz* (2014) 227 Cal.App.4th 1443, 1452, quoting *Worthington v. Davi* (2012) 208 Cal.App.4th 263, 277.)

a. *Diaz's use of deadly force*

Substantial evidence supports the trial court's conclusion that Diaz was not justified in using deadly force either to defend herself or to protect Hile. In its written decision, the trial court explained that it credited the testimony of Hile. According to Hile, when she saw Myers on top of Diaz, she attempted to push Myers off. They rolled, and Myers ended up on top of Hile, with Myers's hands in Hile's hair, pulling her. Hile heard a "pop," which she later learned was a gunshot, and then Myers "got up and ran away."

Hile spoke to Diaz in early July 2012 at a friend's house. Based upon what Diaz told her in that conversation, Hile understood that, during the incident, Diaz had fired the gun in the direction of Hile and Myers. Hile was stunned when she heard that. In a subsequent interview by investigators with the Internal Affairs Bureau (IAB), Hile said that she would have not taken a shot under those circumstances. Hile also told the IAB investigators that, during her conversation with Diaz, Diaz said she was sorry "because she indicated to me that apparently she shot at me when, or at us, when I was fighting or dealing with [Myers]." Until this conversation, Hile thought that Diaz had fired a warning shot or shots.

Hile's testimony supports the conclusion that Diaz did not fire in self-defense. When Diaz shot her weapon, she was at the

car, away from Myers. Myers was on top of Hile and was not approaching Diaz. Diaz did not fire warning shots, but in fact shot in the direction of both Hile and Myers. And, according to the results of her blood-alcohol level at the scene, Diaz did so while highly intoxicated.

Hile's testimony also supports the trial court's conclusion that Diaz was not justified in using deadly force to protect Hile. Shooting in Hile's direction at night while intoxicated was hardly a reasonable method of protecting Hile.

Other evidence also supports the trial court's findings, including Diaz's own prior statements. On the day of the incident, Diaz told the ICIB investigators that, before she shot, Hile told her to "put the gun down." Diaz also told the investigators that Myers said, "You're not going to shoot, you're not going to shoot." From this, the trial court reasonably concluded that neither Hile nor Myers believed deadly force was necessary.

As discussed above, Diaz also made other statements that were inconsistent with her theory of self-defense. She initially told the ICIB investigators that she fired her second shot at Myers as Myers was running away. She then explained that her second shot "was like a few seconds after. I shot the first one, and I got the hold [*sic*] of the gun, and I shot again. But she was still moving. I didn't know if she was going to come towards me or she was running totally away from us." She later admitted that it was not wise to take the second shot because "I didn't have her right there in front of me like I did the first time."

The threatening statements that firefighters overheard at the scene are also inconsistent with Diaz's explanation that she shot in self-defense. Diaz made statements such as "I wish I would have shot that bitch"; "I hope I shot that bitch"; and/or

"going to kill that bitch." As the trial court observed, such statements are made by "an angry person, not a fearful one."

Diaz relies on her own statements and testimony in arguing that she perceived a deadly threat and acted reasonably in defense of herself and Hile. But the trial court was entitled to make its own assessment of Diaz's statements and testimony along with all the other evidence, and could decide what, if any, portions of Diaz's testimony to believe. (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658 [trial court's exercise of independent judgment in reviewing an administrative record requires the court to "reweigh the evidence by examining the credibility of witnesses"].)

Diaz also relies on the testimony of Sergeant Michael Harding, the Department's expert who testified on the use of force. Diaz cites portions of Harding's testimony in which he explained that the justification for using a level of force depends upon the ability of the person using the force to "articulate the facts and circumstances surrounding that event and what led to their decision in regards to a force option." Diaz argues that she *did* articulate that she was afraid for her own life and that Myers would cause great bodily injury to Hile.

Diaz's argument presents a one-sided view of Harding's testimony that the trial court was not obligated to accept. Harding explained that Diaz failed to articulate a *reasonable* fear sufficient to justify the use of deadly force. It was not sufficient for her to explain that she was afraid; Diaz was required to point to facts showing that a reasonable officer would have been in fear

of death or serious injury under the circumstances.[8] Diaz's perception that Myers was advancing toward her was not sufficient to meet that standard absent other facts indicating a deadly threat. Harding explained that "I want something more other than, 'She stepped towards me and I feared.' [¶] Because I can't tell you how many people I could have probably killed out in the field just because I was in fear of them and just because they had stepped towards me after, you know, we fought. So, yes, that's taking someone's life. That is a force, you know, a responsibility that we take seriously. And, yeah, I'm looking for more."

The trial court could make its own assessment of Harding's opinion and the basis for his conclusions. The court did so, finding that "there simply is no possibility that the second shot was reasonable as Harding, the use of force expert, testified." The court concluded that "[i]t does not matter whether Myers was running away, still on top of Hile, or even coming towards [Diaz]."

As discussed above, that finding is supported by Harding's testimony as well as by Hile's testimony. It is also supported by Diaz's own statements. In her explanation to the ICIB of why she shot twice, Diaz did not say that Myers threatened her after she took the first shot. She first said that Myers was running away

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[8] Harding referred to the standard of reasonableness described in *Graham v. Connor* (1989) 490 U.S. 386, which both parties agree is relevant. In that case, the court explained that the reasonableness of an officer's use of force for purposes of a civil rights claim under title 42 United States Code section 1983 should be judged "from the perspective of a reasonable officer on the scene." (*Graham,* at pp. 396–397.)

when she shot again, and then later said only that she wasn't sure if Myers was going to come toward her. In a later statement to the IAB, Diaz said that Myers moved several feet closer to her after the first shot. However, even in that explanation Diaz did not articulate facts compelling a conclusion that she *reasonably* believed she was in fear for her life, particularly in view of her statement that, at the time, she thought she might actually have hit Myers with her first shot.

Diaz also argues that the firefighters' testimony concerning Diaz's angry statements was "uncorroborated by the other individuals on the scene" and is therefore not credible. The trial court, not this court, assesses credibility. The absence of corroborating testimony by the Department deputies that were on the scene could mean that those witnesses did not hear Diaz's statements or simply did not remember them. Three different firefighters heard Diaz make threatening statements at the scene. The absence of additional corroborating testimony from the deputies is not a sufficient ground to reject the trial court's finding that Diaz "was not actually motivated by fear."

b. *Other conduct supporting discipline*

The Department cited grounds for Diaz's discharge in addition to Diaz's decision to shoot at Myers. As mentioned, the Department also relied on Diaz's conduct in (1) carrying an off-duty weapon that she had not registered with the Department and (2) becoming involved in a physical altercation with Myers while intoxicated. Diaz does not address these other grounds, which also support the Department's discipline decision. Regardless of the details of the shooting, Diaz was involved in an argument leading to a fight with another deputy sheriff while intoxicated. Diaz placed herself in a situation leading to physical violence in a public area while her judgment was impaired.

3. The Department Acted Within Its Discretion in Discharging Diaz

This court's review of the degree of discipline that the Department imposed is "the same as that appropriate to the trial court: The discipline imposed will not be disturbed unless it is shown to have been a manifest abuse of discretion." (*Bailey v. City of National City* (1991) 226 Cal.App.3d 1319, 1325, fn. 4.) We find no such abuse of discretion here.

Under *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, in reviewing the Department's discharge decision the "overriding consideration" "is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[h]arm to the public service.' " (*Id.* at p. 218.) Relevant factors include "the circumstances surrounding the misconduct and the likelihood of its recurrence." (*Ibid.*)

Although Diaz had no prior record of discipline, the events surrounding the shooting were extremely serious. Diaz's decision to shoot at a fellow deputy sheriff could have led to the serious injury or death of one or both of the deputies who were in the potential field of fire. The Department reasonably decided that "[i]f the law says you are too intoxicated to operate a motor vehicle, then [Diaz] was probably too intoxicated to discharge her firearm in a safe manner." The Department also reasonably concluded that Diaz's comments overheard by the firefighters "seem to support anger instead of self-defense." The Department acted within its discretion in concluding that Diaz's serious failures in judgment justified discharge.

DISPOSITION

The judgment is affirmed. The County is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.